Supreme Court, U.S.
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No. 03-

In the Supreme Court of the United States

ILLINOIS, PETITIONER,

v.

WILLIAM A. MILLER, RESPONDENT.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the rule of *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) — that the Fourth Amendment permits a law enforcement officer at a traffic stop to order the driver to exit the driver's vehicle — applies during the entire course of the stop.

2. Whether the *Terry* doctrine governs a law enforcement officer's actions at a traffic stop, where the stop has already been justified by probable cause.

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PETITION FOR A WRIT OF CERTIORARI

The State of Illinois respectfully petitions for a writ of certiorari to review the judgment of the Appellate Court of Illinois in this case.

OPINIONS BELOW

The published opinion of the Appellate Court of Illinois (App. 2a-16a) is reported at 345 Ill. App. 3d 836, 803 N.E.2d 610 (2004). The oral ruling of the Circuit Court of the Eleventh Judicial Circuit, Livingston County, Illinois (App. 17a-19a), is unreported. The order of the Supreme Court of Illinois (App. 1a) denying the State's petition for leave to appeal is reported at 209 Ill. 2d 594, ___ N.E.2d ___ (2004).

JURISDICTION

The Appellate Court of Illinois entered judgment on January 15, 2004. The State filed a timely petition for leave to appeal, which was denied by the Supreme Court of Illinois on May 26, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Respondent was charged with drug offenses after cannabis and drug paraphernalia was found on his person and in his car at a traffic stop. The state trial court granted respondent's motion to suppress. A divided panel of the Illinois Appellate Court affirmed, holding that the police officer violated the Fourth Amendment when, immediately prior to returning respondent's license and issuing a warning, he asked respondent to exit his car. In so holding, the majority did not acknowledge *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), or *Ohio v. Robinette*, 519 U.S. 33 (1996), which establish that officers may order drivers out of their cars during lawful traffic stops. Rather than apply *Mimms* and *Robinette*, the majority evaluated the officer's actions under *Terry v. Ohio*, 392 U.S. 1 (1968), even though the traffic stop was justified by probable cause. The Illinois Supreme Court denied the State's petition for discretionary review.

1. At approximately 3:56 p.m. on August 24, 2002, Officer Daniel Davis of the Pontiac police department stopped a car driven by respondent. Davis had been advised of an anonymous tip that respondent was participating in illegal cannabis activity. Davis stopped respondent for driving with a defective muffler and loud exhaust system, a violation of 625 ILCS 5/12-602 (West 2002). App. 3a, 8a-9a.

Officer Davis approached the car, spoke with respondent about the muffler, obtained respondent's driver's license and insurance card, and went back to his squad car. After determining that respondent's license was valid, Davis wrote a warning for the defective muffler. A videotape of the encounter shows that Officer Davis returned to respondent's car and, with the license and insurance card still in hand, said, "Hey, William, could you hop on out for me for a second?" The videotape then

shows that respondent exited the car and followed Davis to the rear of the car. App. 3a-6a.[1]

Sergeant Hugh Roop observed this encounter in a separate vehicle approximately 200 feet away. When respondent exited his car and walked toward Officer Davis, Sergeant Roop warned Davis over the radio that there was "some type of shiny object similar to a knife, a large knife, in [respondent's] pocket." Davis asked respondent about the object, and respondent admitted that it was a knife. Davis removed the knife from respondent's person and placed it on the hood "for officer safety." App. 4a-5a.

Officer Davis then asked respondent if he had anything else on him that Davis should know about, and respondent replied that he had cannabis and drug paraphernalia in his pocket. Davis searched respondent for other potential weapons and found a bag of cannabis and a gold smoking pipe. Davis then placed respondent under arrest. A search of respondent's car revealed a "large amount of cannabis." App. 5a.

2. Respondent was charged with the unlawful possession with intent to deliver cannabis, 720 ILCS 550/5(c) (West 2002), and unlawful possession of drug paraphernalia, 720 ILCS 600/3.5(a) (West 2002). Respondent filed a motion to quash his arrest and suppress evidence. App. 3a. The state trial court granted the motion. App. 17a-19a.

3. A divided Illinois Appellate Court affirmed. App. 2a-16a. Following long-standing Illinois precedent, the majority evaluated Officer Davis's actions under the *Terry* doctrine:

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[1] Officer Davis testified at the suppression hearing that he returned respondent's documents before asking him to exit his car. App. 4a, 9a-10a. As the videotape clearly demonstrated, that particular aspect of the officer's testimony was factually inaccurate.

> "Because a traffic stop is more analogous to a *Terry* investigative stop (see *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)) than to a formal arrest, the reasonableness of a traffic stop is analyzed under *Terry* principles. [Citation.] A *Terry* analysis involves a dual inquiry: '(1) "whether the officer's action was justified at its inception," and (2) "whether it was reasonably related in scope to the circumstances which justified the interference in the first place."'"

App. 8a (quoting *People v. Bunch*, 207 Ill. 2d 7, 13-14, 796 N.E.2d 1024, 1029 (2003) (quoting *People v. Gonzalez*, 204 Ill. 2d 220, 228, 789 N.E.2d 260, 266 (2003) (quoting *Terry*, 392 U.S. at 19-20))) (brackets in original).

With respect to the first *Terry* prong, the majority held that the initial stop of respondent's car was legally justified because Officer Davis had probable cause to believe that respondent had committed traffic violations. App. 8a-9a. However, the majority concluded that Davis violated the second *Terry* prong by ordering respondent to exit his car.

The majority reasoned that "[w]hen Davis returned to [respondent's] car, he had completed his determination of the motor vehicle offense and verification of [respondent's] driver license and insurance information. He had nothing else to do *at that point* other than return [respondent's] documents to him." App. 10a (emphasis in original). The majority characterized Officer Davis' request to respondent to exit his car as "a *Terry* investigative seizure." *Id.* 11a. Finding that the request was neither related to the traffic offense nor supported by "articulable facts" of wrongdoing, the majority concluded that the request violated the second *Terry* prong. *Id.* 10a-11a.[2] In so

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[2] The majority briefly and alternatively analyzed the stop under the (factually incorrect) assumption that Officer Davis returned

holding, the majority did not acknowledge, let alone distinguish, this Court's decisions in *Mimms* and *Robinette*.

The dissent agreed with the majority that Officer Davis had probable cause to initiate the traffic stop, but concluded that the Fourth Amendment did not preclude Davis from ordering respondent to exit his car. The dissent noted that the traffic stop had not ended by the time Davis ordered respondent out of the car. App. 13a. Citing *Mimms*, 434 U.S. at 111, the dissent explained that "[d]uring a lawful traffic stop, a police officer may order the driver out of the vehicle." App. 13a. And, citing *Robinette*, 519 U.S. at 35, the dissent reasoned that an officer at a traffic stop may order a motorist out of his vehicle prior to returning his documents and issuing a warning. App. 13a-15a. Given *Mimms* and *Robinette*, the dissent concluded that "the effect of the majority's holding is to ignore the established precedent of the United States Supreme Court." *Id.* 15a.

4. The State timely filed a petition for leave to appeal, which the Illinois Supreme Court denied. App. 1a.

REASONS FOR GRANTING THE PETITION

This case presents a straightforward question with a clear-cut answer. The question is whether the Fourth Amendment allows a law enforcement officer at a traffic stop to order the driver out of the driver's car immediately before returning the driver's documents and issuing a warning or a ticket. The answer is "Yes," a result dictated by this Court's decisions in *Pennsylvania v. Mimms*, *supra*, and *Ohio v. Robinette*, *supra*. The Illinois Appellate Court's ruling -- that Officer Davis violated the Fourth Amendment because he ordered respondent

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respondent's documents before ordering him out of his car. App. 9a-10. However, as noted above (page 3 n. 1, *supra*) and by the court (App. 10a), the videotape clearly showed that Davis had not returned the documents to respondent before ordering him out of his car.

from his car just before returning his documents and issuing a warning — resolves an important federal constitutional question in a manner directly contrary to *Mimms* and *Robinette*, as well as to the decisions of other courts. Certiorari should be granted on this ground alone.

The Illinois Appellate Court's erroneous judgment results from its failure to implement the clear mandate of *Mimms* and *Robinette*. The court's error also lies in its adherence to long-standing Illinois precedent requiring courts to use *Terry* principles when evaluating police actions at a traffic stop supported by probable cause. Applying *Terry* in this context is wrong as a matter of law, and contributes to a deepening division among lower courts over whether *Terry* is appropriately used to evaluate police actions at such stops. Certiorari should be granted to resolve this recurring and important issue.

I. The Illinois Appellate Court's Judgment Squarely Conflicts With This Court's Decisions in *Mimms* and *Robinette*, As Well As With The Decisions Of Other Courts.

This case could and should have been resolved by a straightforward application of *Mimms* and *Robinette*.

In *Mimms*, an officer stopped the defendant for driving with an expired license plate and asked him to step out of his car. 434 U.S. at 107. When the defendant exited his car, the officer noticed a bulge under his jacket, which a frisk revealed to be a .38-caliber revolver. *Ibid.* The defendant was charged with weapons offenses and moved to suppress the revolver. *Ibid.* The state trial court denied the motion and convicted the defendant, but the Pennsylvania Supreme Court reversed, holding that the search violated the Fourth Amendment because the officer's order to the defendant to get out of the car was an impermissible seizure. *Id.* at 107-108.

This Court reversed. Even though there was nothing suspicious about the defendant, the Court held that ordering him out of his car was reasonable under the Fourth Amendment. *Id.* at 109-111. Recognizing "the inordinate risk confronting an officer as he approaches a person seated in an automobile," the Court stated that it was "too plain for argument that the State's proffered justification — the safety of the officer — is both legitimate and weighty." *Id.* at 110. The Court further noted that "[t]he hazard of accidental injury from passing traffic to an officer standing on the driver's side of the vehicle may also be appreciable in some situations," and that "[r]ather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both." *Id.* at 111.

In light of these compelling interests, the Court established this *per se* rule: "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." *Id.* at 111 n.6. Accord, *Maryland v. Wilson*, 519 U.S. 408 (1997) (reaffirming *Mimms* and holding that its rule applies to passengers as well as to drivers).

As noted above, the Illinois Appellate Court in this case did not acknowledge *Mimms*, let alone explain why it should not govern this case. Nonetheless, by focusing upon the fact that Officer Davis ordered respondent out of his car just before returning his documents and giving him a warning, the court effectively held that *Mimms* becomes inapplicable near the conclusion of a stop.

That view on the *Mimms* rule cannot be reconciled with *Mimms* itself, which draws no distinction between the beginning, middle or near-end of a traffic stop. Nor can it be reconciled with *Robinette*. In *Robinette*, an officer stopped the

defendant for speeding, asked for and received the defendant's drivers's license, and then ran a computer check. 519 U.S. at 35. After the computer check revealed that the defendant had no previous violations, the officer asked the defendant to step out of his car, issued a verbal warning rather than a ticket, and then returned his license. *Ibid.* At that point, the officer asked the defendant for consent to search the car; the defendant consented, and the search revealed illegal drugs. *Id.* at 35-36. The defendant unsuccessfully moved to suppress the drugs and was convicted. *Id.* at 36. The Ohio Supreme Court ruled that the motion should have been granted, holding, in relevant part, that when the officer "returned to [the defendant's] car and asked him to get out of the car, after [the officer] had determined in his own mind not to give [the defendant] a ticket, the detention then became unlawful" under the Fourth Amendment. *Id.* at 38.

This Court reversed, reasoning that "there is no question that, in light of the admitted probable cause to stop [the defendant] for speeding, [the officer] was objectively justified in asking [the defendant] to get out of the car, subjective thoughts notwithstanding." *Ibid.* (citing *Mimms*, 434 U.S. at 111 n.6). Thus, *Robinette* establishes that the *Mimms* rule applies with full force at all times during a traffic stop, including the time just before an officer returns the driver's documents and issues a warning. The Illinois Appellate Court's decision in this case, which held that the Fourth Amendment prohibited Officer Davis from ordering respondent out of his car at precisely the same time and under precisely the same circumstances, is flatly contrary to *Robinette*.

The decision below is also inconsistent with lower court decisions holding that the *Mimms* rule applies during the entire course of a traffic stop, including at the point where the officer is about to return the driver's documents and/or issue a warning or a ticket. See, *e.g.*, *Mitchell v. United States*, 746 A.2d 877,

886 (D.C. 2000) ("[b]ecause a legitimate traffic stop was not yet over, it was constitutionally permissible for Officer Gaudioso to ask Mitchell to exit his car," even though the officer's "subjective intent was to conduct a search for which * * * he lacked constitutional justification at the time") (citing *Mimms*, 434 U.S. at 111 n.6); *State v. Silva*, 134 Idaho 848, 853, 11 P.3d 44, 49 (App. 2000) (*Mimms* allowed officer to "ask[] [the defendant] to exit his vehicle in preparation for handing and explaining the ticket to him"); *United States v. Gold*, 77 F. Supp. 2d 936 (S.D. Ind. 1999) (same); *Commonwealth v. Wyatt*, 1999 WL 1126572, *3-*5 (Va. App.) (*Mimms* allowed officer to order driver out of car before giving the defendant a warning and returning his driver's license and vehicle registration). These decisions are consistent with *Mimms*, which makes clear that an officers may order the driver out of his car at the point of the stop just before the officer issues a ticket or warning. See *Mimms*, 434 U.S. at 111 (noting that "[t]he hazard of accidental injury from passing traffic to an officer standing on the driver's side of the vehicle may also be appreciable in some situations," and that "[r]ather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both.").

For these reasons, certiorari should be granted and the judgment below should be reversed.

II. The Illinois Appellate Court's Application Of *Terry* Principles To A Traffic Stop Supported By Probable Cause Deepens An Existing Conflict And Warrants This Court's Intervention.

To determine whether the Fourth Amendment prohibited Officer Davis from ordering respondent out of his car, the Illinois Appellate Court applied *Terry*, holding that Davis could have ordered respondent out of his car only if there were

"articulable facts" to support a suspicion of wrongdoing. App. 11a. In so holding, the court not only ignored *Mimms* and *Robinette*, but also contributed to an existing split over whether *Terry* principles govern police actions that occur during a traffic stop justified by probable cause. This split provides an independent ground for granting certiorari.

The Illinois Appellate Court's analysis adheres to a long line of Illinois precedent that uses *Terry* to evaluate police actions at traffic stops even where the stop is justified by probable cause. See *People v. Caballes*, 207 Ill. 2d 504, 508-509, 802 N.E.2d 202, 204 (2003), cert. granted, 124 S. Ct. 1875 (2004);[3] *People v. Harris*, 207 Ill. 2d 515, 522-524, 802 N.E.2d 219, 225 (2003), pet. for cert. pending, No. 03-1224 (U.S.); *People v. Bunch*, 207 Ill. 2d 7, 13-14, 796 N.E.2d 1024, 1029 (2003), cert. denied, 124 S. Ct. 1712 (2004); *People v. Gonzalez*, 204 Ill. 2d 220, 228, 789 N.E.2d 260, 266 (2003) (declining to "distinguish between those cases in which the traffic stop is based on *Terry*'s 'articulable suspicion' and those cases in which the traffic stop is supported by probable cause," and holding that "*Terry* principles apply even in the presence of probable cause"); *People v. Cox*, 202 Ill. 2d 462, 469-471, 782 N.E.2d 275, 280-281 (2002), cert. denied, 539 U.S. 937 (2003); *People v. Gonzalez*, 184 Ill. 2d 402, 420-422, 704 N.E.2d 375, 384 (1998), cert. denied, 528 U.S. 825 (1999).

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[3] The question presented in *Caballes* is: "Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop." Brief for Petitioner in *Illinois v. Caballes*, No. 03-923, at i. In addressing that question, the State's opening brief argues, in relevant part, that the Illinois Supreme Court erred in applying *Terry* principles to actions taken by the police (in *Caballes*, a canine sniff) during a traffic stop justified by probable cause. See *id.* at 11-17.

Like the Illinois courts, several other state and federal courts apply *Terry* principles when determining the Fourth Amendment validity of police actions at traffic stops resting on probable cause. See, *e.g.*, *United States v. Grant*, 349 F.3d 192, 196 (5th Cir. 2003), cert. denied, 124 S. Ct. 1526 (2004); *United States v. Wellman*, 185 F.3d 651, 655-656 (6th Cir. 1999); *United States v. Holt*, 264 F.3d 1215, 1230 (10th Cir. 2001) (*en banc*); *United States v. Purcell*, 236 F.3d 1274, 1277 (11th Cir.), cert. denied, 534 U.S. 830 (2001); *State v. Dickey*, 152 N.J. 468, 476, 706 A.2d 180, 184 (1998); *Barch v. State*, 92 P.3d 828, 831-832 (Wyo. 2004). See also *Mena v. City of Simi Valley*, 332 F.3d 1255, 1264 (9th Cir. 2003) (holding, without express reference to *Terry*, that "an INS agent must have a *particularized reasonable suspicion* that an individual is not a citizen to interrogate that individual regarding his citizenship") (emphasis in original), cert. granted sub nom., *Muehler v. Mena*, 124 S. Ct. 2842 (2004).[4]

Other courts have expressly rejected the view that *Terry* principles govern the Fourth Amendment validity of police actions at traffic stops justified by probable cause. See, *e.g.*, *United States v. Garcia*, 376 F.3d 648, 650 (7th Cir. 2004) ("it is inappropriate to treat investigations following traffic stops as governed by *Terry*, when the stop rests on probable cause to believe that an offense has been committed"); *United States v. Childs*, 277 F.3d 947, 952-954 (7th Cir.) (*en banc*) (expressly

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[4] The first question presented in *Muehler* is: "Whether, in light of this Court's repeated holdings that mere police questioning does not constitute a seizure, the Ninth Circuit erred in ruling that law enforcement officers who have lawfully detained an individual pursuant to a valid search warrant engage in an additional, unconstitutional 'seizure' if they ask that person questions about criminal activity without probable cause to believe that the person is or has engaged in such activity." Petition for a Writ of Certiorari in *Muehler v. Mena*, No. 03-1423, at i.

rejecting *Holt*), cert. denied, 537 U.S. 829 (2002); *United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643, 647-648 (8th Cir. 1999) (refusing to apply *Terry* doctrine to traffic stop predicated on probable cause: "A traffic stop is not investigative; it is a form of arrest, based upon probable cause that a penal law has been violated."), cert. denied sub nom., *Alexander v. United States*, 528 U.S. 1161 (2000). See also *United States v. Pratt*, 355 F.3d 1119, 1123 (8th Cir. 2004) (favorably citing *Childs* and *$404,905.00 in U.S. Currency*).

Two recent decisions from the Minnesota Supreme Court reflect the ongoing confusion in this area of the law. In a decision issued two years ago, Minnesota aligned itself with those jurisdictions holding that "*Terry* principles are appropriately applied * * * when a motor vehicle is stopped for a routine equipment violation." *State v. Wiegand*, 645 N.W.2d 125, 133 (Minn. 2002). The Minnesota court (*id.* at 134) did so on the strength of *Berkemer v. McCarty*, 468 U.S. 420 (1984). The question in *Berkemer* was whether roadside questioning of a motorist detained at a traffic stop constitutes "custodial interrogation" under the *Miranda* doctrine. *Id.* at 423. In the course of ruling that such motorists are not "in custody" for *Miranda* purposes, *Berkemer* observed that "the usual traffic stop is more analogous to a so-called '*Terry* stop' than to a formal arrest." *Id.* at 439 (citation omitted). Based upon this language, the Minnesota court concluded that *Terry* governs police action at all traffic stops. *Wiegand*, 645 N.W.2d at 133-134. Accord, *e.g.*, *Wellman*, 185 F.3d at 656 (citing *Berkemer* for the same proposition); *Gonzalez*, 184 Ill. 2d at 421-422, 704 N.E.2d at 384 (same).

The Minnesota court revisited this issue in *State v. Askerooth*, 681 N.W.2d 353 (Minn. 2004). *Askerooth* presented typical facts — the defendant was pulled over for committing a traffic violation; events during the stop revealed that the defendant possessed illegal drugs; and the defendant unsuccess-

fully moved to suppress the drugs on the ground that the officer's actions violated the Fourth Amendment. *Id.* at 356-359. In considering the suppression issue, the court recognized that its prior decision in *Wiegand*, as well the Illinois Supreme Court's decision in *Gonzalez* and the Tenth Circuit's *en banc* decision in *Holt*, had held that "the *Terry* analysis applies *irrespective* of whether a stop for a minor traffic offense is based on reasonable suspicion or supported by probable cause." *Id.* at 360 (emphasis in original).

Two considerations prompted the Minnesota court to reconsider that holding. First, the court recognized that *Berkemer* had qualified the analogy it had drawn between traffic stops and *Terry* stops:

> "[n]o more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*. We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop."

Id. at 360 (quoting *Berkemer*, 468 U.S. at 439 n.29). This qualification, the Minnesota court suggested, cast doubt on whether the *Terry* doctrine governs traffic stops justified by probable cause. *Ibid.* Accord, *Childs*, 277 F.3d at 953 ("although traffic stops usually proceed like *Terry* stops, the Constitution does not require this equation" for stops justified by probable cause) (citing *Berkemer*, 468 U.S. at 439 n.29).

Second, the Minnesota court noted that "[w]hether *Terry* can still be applied to traffic stops supported by probable cause is uncertain in light of" *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). *Askerooth*, 681 N.W.2d at 360. *Atwater* held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment,

arrest the offender." 532 U.S. at 354. The Minnesota court interpreted *Atwater* as "remov[ing] Fourth Amendment reasonableness limitations from even a 'very minor' traffic stop when the stop is supported by probable cause." *Askerooth*, 681 N.W.2d at 361 (quoting *Atwater*, 532 U.S. at 354). Given its view of *Atwater*, and citing the Seventh Circuit's *en banc* decision in *Childs*, the Minnesota court declared itself "uncertain that *Terry* principles still apply to a court's determination whether a seizure during such a traffic stop can be unreasonable under the Fourth Amendment." *Ibid.*

There are other reasons, not cited by the Minnesota Supreme Court in *Askerooth*, to conclude that *Terry* does not govern traffic stops supported by probable cause. The *Terry* doctrine requires that investigatory stops — which need only be justified by reasonable suspicion — have a limited duration and not "resemble a traditional arrest." *Hiibel v. Sixth Judicial Dist. Ct.*, 124 S. Ct. 2451, 2458 (2004). By contrast, as *Atwater* teaches, if there is probable cause to believe that a driver has committed a minor traffic offense, a police officer "may, without violating the Fourth Amendment, arrest the offender." 532 U.S. at 354; see also *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001). In this most fundamental sense, a traffic stop supported by probable cause is not a *Terry* stop. It would erode the important distinction between the two types of seizures to apply *Terry* principles, which impose stringent limits on the scope and duration of a seizure, to traffic stops justified by probable cause.

Another difference lies in the distinct modes of analysis applied to *Terry* stops, on the one hand, and traffic stops justified by probable cause, on the other. The validity of *Terry* stops, and of police conduct occurring at such stops, depends upon a fact-specific balancing of "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *United*

States v. Hensley, 469 U.S. 221, 228 (1985); see also *Hiibel*, 124 S. Ct. at 2459-2460. As this Court has made clear, such fact-specific balancing is inappropriate when determining the validity of traffic stops supported by probable cause and of police conduct at such stops. See *Atwater*, 532 U.S. at 354-355; *Whren v. United States*, 517 U.S. 806, 817-819 (1996); see also *Hensley*, 469 U.S. at 236-237 (Brennan, J., concurring). In this sense as well, the *Terry* doctrine is fundamentally incompatible with traffic stops justified by probable cause.

In using *Terry* to evaluate Officer Davis's order to respondent to get out of his car, the Illinois Appellate Court not only erred as a matter of Fourth Amendment law, but also exacerbated the deep and intractable split over whether *Terry* governs police conduct at traffic stops justified by probable cause. The split has real-world consequences, as the outcome of specific cases, including this case, depends upon which rule is applied. Had this case been prosecuted, not by the State of Illinois in the Circuit Court of Livingston County, but by the federal government in the United States District Court for the Central District of Illinois, the Fourth Amendment analysis would have been governed by the Seventh Circuit's *en banc* opinion in *Childs*, not by the Illinois Supreme Court's opinion in *Gonzalez*; Officer Davis's actions would not have been evaluated under the *Terry* doctrine; there would have been no conceivable basis to hold that Davis violated the Fourth Amendment by ordering respondent out of his car; and respondent's suppression motion would have been denied, not granted. Compare also *Childs*, 277 F.3d at 950-954 (declining to apply *Terry* and holding that police questioning unrelated to purpose of traffic stop does not violate Fourth Amendment), with *People v. Leigh*, 341 Ill. App. 3d 492, 792 N.E.2d 809 (2003) (applying *Terry* and holding that police questioning unrelated to purpose of traffic stop violates Fourth Amendment), and *People v. Lomas*, ___ Ill. App. 3d ___, 812 N.E.2d 39 (2004) (same).

The fact that the outcome of criminal cases in Illinois depends upon whether the case proceeds in federal or state court presents a textbook example of a certworthy split. See R. STERN, ET AL., SUPREME COURT PRACTICE 226 (8th ed. 2002) ("A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts."). And given the thousands of traffic stops that take place every day across the Nation, it is not surprising that the standard governing police action during such stops is an issue that recurs with great frequency. See generally 118 A.L.R. Fed. 167 (1994 & Supp.) (citing cases); Lawrence, *The Scope Of Police Questioning During A Routine Traffic Stop: Do Questions Outside The Scope Of The Original Justification For The Stop Create Impermissible Seizures If They Do Not Prolong The Stop?*, 30 FORDHAM URB. L.J. 1919 (2003); Vazquez, *"Do You Have Any Drugs, Weapons, Or Dead Bodies In Your Car?" What Questions Can A Police Officer Ask During A Traffic Stop*, 76 TUL. L. REV. 211 (2001); Moran, *Traffic Stops, Littering Tickets, And Police Warnings: The Case For A Fourth Amendment Non-Custodial Arrest Doctrine*, 37 AM. CRIM. L. REV. 1143 (2000).

In sum, the split over whether *Terry* principles govern the Fourth Amendment validity of police conduct at traffic stops justified by probable cause is deep, intractable, and ripe for consideration. Without resolution of the conflict by this Court, lower courts will continue to disagree over this important and recurring question.

CONCLUSION

The petition for a writ of certiorari should be granted. In view of the clear conflict between the decision below and this Court's decisions in *Mimms* and *Robinette*, the Court may wish to consider summary reversal on the first question presented.

At a minimum, the petition should be held pending this Court's resolution on the merits of *Illinois v. Caballes*, No. 03-923, which may address the second question presented here (see page 10 n.3, *supra*), or this Court's resolution on the merits of *Muehler v. Mena*, No. 03-1423, which presents a question similar to the second question presented here (see page 11 n.4, *supra*).

Respectfully submitted.

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AUGUST 2004

APPENDIX

Supreme Court of Illinois

No. 97922

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. WILLIAM A. MILLER, Appellee.

May 26, 2004

Disposition of Petitions for Leave to Appeal

Denied.

No. 4–02–0953

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
A.D., 2003

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the
	)	11th Judicial Circuit,
Plaintiff-Appellant,	)	Livingston County, Illinois
	)	
v.	)	No. 02 CF 163
	)	
WILLIAM A. MILLER,	)	Honorable
	)	Harold J. Frobish,
Defendant-Appellee.	)	Judge Presiding

January 15, 2004

Justice APPLETON delivered the Opinion of the Court:

The State charged defendant, William A. Miller, with unlawful possession with intent to deliver cannabis (720 ILCS 550/5(c) (West 2002)) and unlawful possession of drug paraphernalia (720 ILCS 600/3.5(a) (West 2002)). Defendant filed a motion to quash the arrest and suppress evidence. At the conclusion of an evidentiary hearing, the trial court granted the motion. On appeal, the State argues the trial court erred in granting defendant's motion and suppressing evidence. We affirm.

I. BACKGROUND

In August 2002, the State charged defendant by information with one count of unlawful possession with intent to deliver cannabis (720 ILCS 550/5(c) (West 2002)), alleging he knowingly and unlawfully possessed, with intent to deliver, more than 10 grams, but not more than 30 grams, of a substance containing cannabis. The State also charged him with one count of unlawful possession of drug paraphernalia (720 ILCS 600/3.5(a) (West 2002)), alleging he knowingly possessed a gold metal smoking pipe with the intent to use it to smoke cannabis.

In October 2002, defendant filed a motion to quash the arrest and suppress evidence. He alleged that at the time of the stop, neither he nor any of the car's occupants had committed a crime or violated any traffic laws. Further, he argued the police officer had stopped and detained him without probable cause.

In November 2002, the trial court held a hearing on defendant's motion. Defense counsel called Daniel Davis, a police officer with the Pontiac police department. Davis testified he stopped a car driven by defendant at approximately 3:56 p.m. on August 24, 2002. Approximately an hour before the stop, Davis was advised of an anonymous tip that defendant had been participating in illegal activity involving cannabis. Davis was therefore "looking to speak" with defendant, whose vehicle he saw parked at a residence in Pontiac. After following defendant, Davis pulled him over because of "a defective muffler, loud exhaust system." He characterized the muffler as "abnormally loud, and when the vehicle accelerated, it was even louder, a lower guttural sound."

After stopping defendant's car, Davis approached and spoke with defendant regarding the muffler. He obtained defendant's driver's license and insurance card and returned to his squad

car, while another officer spoke with two passengers in the car. Having determined that defendant had a valid license, Davis wrote a warning for the muffler, returned to defendant's car, and (according to Davis's testimony) handed those documents to defendant.

Defense counsel asked Davis:

"Q. * * * So, traffic stop completed at that point, you're giving him the warning and giving him his insurance card and his license back?

A. That is correct.

Q. * * * At some point, did someone ask [defendant] to remove himself from the vehicle?

A. Yes, I did, so I could speak with him regarding the earlier complaint.

Q. * * * Was this after you had given him the insurance card and license and warning ticket?

A. Yes.

Q. And what was your motivation in asking him to remove himself from the vehicle?

A. Just so I could speak with him separate from his two passengers regarding the information that we had received."

Davis testified that Sergeant Hugh Roop was observing the stop in a separate vehicle approximately 200 feet away. When defendant got out of the car and walked toward Davis, Roop warned Davis, over the radio, that he saw "some type of shiny object similar to a knife, a large knife, in [defendant's] pocket." Davis asked defendant about the object, which, defendant admitted, was a knife. Davis removed a "large sheath knife" and

set it on the hood of the car "for officer safety." Davis asked defendant if there was anything else on him he should know about, and defendant told him "about the cannabis and other paraphernalia in his pocket." Davis then searched defendant for other potential weapons and found a bag of cannabis and a gold smoking pipe. He placed defendant under arrest. A search of defendant's car revealed a "large amount of cannabis."

Defense counsel then played a videotape, shot from Davis's squad car, showing the traffic stop. Davis narrated the events up to when he pulled defendant's car over. The videotape showed Davis approaching the driver's side of the car and another police officer, Adam Fulkerson, on the passenger side. Thereafter, defense counsel fast-forwarded the tape to when Davis returned to defendant's car, because the trial court wanted to hear that conversation. Upon watching that sequence, the court remarked that Davis appeared to say, " '[W]ould you step on out, would you step on out for a second[?']"

The court continued, in part, as follows:

> "Not wanting to cut anybody short, but the [a]ppellate [c]ourt when they get this will say, at that instant he was seized, it's an absolute seizure of the defendant. The [a]ppellate [c]ourt will say, this was a good stop, if you have excessive or unusual noise out of your muffler, the police can stop. The [a]ppellate [c]ourt will say the traffic stop was * * * 100 [%] completed. * * *
>
> But, I mean, we've got a good stop, we've got the traffic stop completed, we've got the defendant in the car. The other officers didn't add a lot other than in his mind, of the defendant or anybody else, this looks like it's pretty serious. But this amounts to an instruction by the officer to get out of the car. He is seized at that point, and it's at that point that the stop is tainted."

> The trial court granted the State permission to cross-examine Davis. Davis agreed it appeared, from the videotape, that he said to defendant, "Hey, William, could you hop on out for me for a second?" He testified that if defendant had stated he did not want to get out of the car, the stop "would have been completed" and he would have let him go. The videotape showed that after Davis asked defendant to "hop on out," Davis walked away from the car. Davis did not open the door or order defendant out of the car. Davis testified that defendant exited his car, after which Davis removed the knife from defendant's belt and asked him if he had anything else he should know about, whereupon defendant "voluntarily told [him] that he had a pipe and a bag of weed in his left pocket."

Watching the videotape, one can see Davis approaching the driver's window of defendant's car, collecting documents from defendant, and returning, documents in hand, to his squad car. Then, after a few minutes, one can see Davis walking back to defendant's car, documents in hand, and, without handing defendant anything, asking him to get out. As defendant gets out of the car and follows Davis to the rear of the car, Davis still has the documents in his hand.

The trial court granted defendant's motion to suppress, characterizing this situation "as a direction to get out of the car." The State filed a certificate of substantial impairment and appealed the trial court's ruling pursuant to Supreme Court Rule 604(a) (188 Ill. 2d R. 604(a)).

II. ANALYSIS

The State argues the trial court erred in granting defendant's motion to quash the arrest and suppress evidence. We disagree.

A. Standard of Review and Burden of Proof

The appeal of a ruling on a motion to suppress presents mixed questions of law and fact. *People v. Gherna*, 203 Ill. 2d 165, 175, 271 Ill. Dec. 245, 784 N.E.2d 799, 805 (2003). We will not disturb the trial court's factual determinations and assessment of witnesses' credibility unless they are manifestly erroneous. *People v. Anthony*, 198 Ill. 2d 194, 200-01, 260 Ill. Dec. 632, 761 N.E.2d 1188, 1191 (2001). We review de novo the trial court's ultimate decision of whether to suppress the evidence. See *People v. Crane*, 195 Ill. 2d 42, 51, 252 Ill. Dec. 687, 743 N.E.2d 555, 562 (2001).

On a motion to suppress evidence, the defendant has the burden of proving the search and seizure were unlawful. 725 ILCS 5/114-12(b) (West 2002). "However, once the defendant makes a *prima facie* showing of an illegal search and seizure, the burden shifts to the State to produce evidence justifying the intrusion." *People v. Ortiz*, 317 Ill. App. 3d 212, 220, 250 Ill. Dec. 542, 738 N.E.2d 1011, 1018 (2000).

B. The Traffic Stop

The fourth amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. Similarly, the Illinois Constitution affords citizens with "the right to be secure in their persons, houses, papers[,] and other possessions against unreasonable searches, [and] seizures." Ill. Const.1970, art. I, § 6. Our supreme court has interpreted the search and seizure clause of section 6 in a manner consistent with the United States Supreme Court's fourth amendment jurisprudence. *People v. Gonzalez*, 204 Ill. 2d 220, 224, 273 Ill. Dec. 360, 789 N.E.2d 260, 264 (2003).

A temporary detention of an individual during a vehicle stop constitutes a "seizure" of his or her person within the meaning of the fourth amendment, even if the stop is brief and for a limited purpose. *Whren v. United States*, 517 U.S. 806, 809-10, 116 S. Ct. 1769, 1772, 135 L.Ed.2d 89, 95 (1996). The Supreme Court has held:

> "An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren*, 517 U.S. at 810, 116 S. Ct. at 1772, 135 L.Ed.2d at 95.

Our own supreme court has explained:

> "Because a traffic stop is more analogous to a *Terry* investigative stop (see *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968)) than to a formal arrest, the reasonableness of a traffic stop is analyzed under *Terry* principles. [Citation.] A *Terry* analysis involves a dual inquiry: '(1) "whether the officer's action was justified at its inception," and (2) "whether it was reasonably related in scope to the circumstances which justified the interference in the first place."' *Gonzalez*, 204 Ill. 2d at 228, [273 Ill. Dec. 360, 789 N.E.2d at 266,] quoting *Terry*, 392 U.S. at 19- 20, 88 S. Ct. at 1879, 20 L.Ed.2d at 905." *People v. Bunch*, 207 Ill. 2d 7, 13-14, 277 Ill. Dec. 658, 796 N.E.2d 1024, 1029 (2003).

In the case *sub judice*, the legality of the initial stop of defendant's vehicle under the first prong of *Terry* is not at issue. Both parties agree Davis was justified in stopping defendant's vehicle because of his observation of a traffic violation. He pulled defendant over because his car had an "abnormally loud"

muffler, a violation of section 12-602 of the Illinois Vehicle Code (625 ILCS 5/12-602 (West 2002)). See also *People v. Sorenson*, 196 Ill. 2d 425, 433, 256 Ill. Dec. 836, 752 N.E.2d 1078, 1084 (2001) (stop of vehicle justified based on officer's observation of traffic violation). Thus, Davis had probable cause to initiate a valid traffic stop.

C. The Completion of the Traffic Stop

Under the second prong of the *Terry* analysis, a court considers the length of the detention and the manner in which it was carried out. *Bunch*, 207 Ill. 2d at 14, 277 Ill. Dec. 658, 796 N.E.2d at 1029. The Supreme Court has stated "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325, 75 L.Ed.2d 229, 238 (1983) (plurality opinion). Upon initiating a minor traffic stop, a police officer may briefly detain the driver to request his driver's license, determine its validity and, under certain circumstances, conduct a speedy warrant check. *Ortiz*, 317 Ill. App. 3d at 220, 250 Ill. Dec. 542, 738 N.E.2d at 1018. After stopping defendant, Davis rightfully obtained defendant's driver's license and insurance information to verify in his squad car.

Once a check of a driver's license and any warrant information is completed, "if no further suspicion is aroused, the traffic stop must cease and the individual should no longer be detained." *Ortiz*, 317 Ill. App. 3d at 220, 250 Ill. Dec. 542, 738 N.E.2d at 1018. The police officer should then issue a ticket or warning and allow the driver to continue on his or her way. See *People v. Koutsakis*, 272 Ill. App. 3d 159, 164, 208 Ill. Dec. 549, 649 N.E.2d 605, 609 (1995) (Third District).

Here, Davis testified he returned defendant's driver's license and insurance card *prior* to asking defendant to step out of his car. If such was the case, the traffic stop ended when

Davis returned the driver's license and insurance card and gave defendant either a verbal or written warning. See *People v. Brownlee*, 186 Ill. 2d 501, 516, 239 Ill. Dec. 25, 713 N.E.2d 556, 565 (1999) (traffic stop concluded when officer returned driver's license and insurance card and told the defendant no citations would be issued); *Ortiz*, 317 Ill. App. 3d at 221, 250 Ill. Dec. 542, 738 N.E.2d at 1018 (investigative stop complete after officer returned the defendant's driver's license and issued a warning).

Even if, as the videotape seems to show, Davis did not return the license and insurance card prior to requesting defendant to exit the vehicle, the traffic stop was nevertheless complete. When Davis returned to defendant's car, he had completed his determination of the motor vehicle offense and verification of defendant's driver's license and insurance information. He had nothing else to do *at that point* other than return defendant's documents to him. We must assess Davis's direction or request to defendant to get out of the car according to the second prong of the *Terry* analysis, as used in *Gonzalez*.

As the trial court correctly found, the initial traffic stop, whether pretextual or not, was valid. The scope of the permissible "seizure" of defendant was limited, however, to the traffic offense, absent other articulable facts to justify prolonging the seizure. *Bunch*, 207 Ill. 2d at 16, 277 Ill. Dec. 658, 796 N.E.2d at 1036.

We find the rule the supreme court expressed in *Brownlee*, 186 Ill. 2d at 517, 239 Ill. Dec. 25, 713 N.E.2d at 564, to be applicable here. In *Brownlee*, 186 Ill. 2d at 520, 239 Ill. Dec. 25, 713 N.E.2d at 565, the police completed all that was necessary for their traffic stop. They then delayed allowing the vehicle to leave before asking for permission to search the car. *Brownlee*, 186 Ill. 2d at 520, 239 Ill. Dec. 25, 713 N.E.2d at 565-66. The supreme court agreed that during the delay, the driver of the car could not have believed himself free to leave.

Brownlee, 186 Ill. 2d at 520, 239 Ill. Dec. 25, 713 N.E.2d at 566.

The videotape here shows that while Davis had nothing more to do to complete the traffic stop, he held on to defendant's documents, thereby preventing him from leaving. See *People v. Hardy*, 142 Ill. App. 3d 108, 118, 96 Ill. Dec. 447, 491 N.E.2d 493, 500 (1986) (retention of driver's license tends to negate freedom to leave). His request for defendant to exit the car therefore was the same as the request in *Brownlee* to search the car, *i.e.*, without articulable facts justifying a *Terry* investigative seizure. The subsequent search is therefore tainted, and the fruits thereof were properly suppressed. See *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S. Ct. 407, 416, 9 L.Ed.2d 441, 453 (1963).

III. CONCLUSION

For the foregoing reasons, the decision of the trial court granting defendant's motion to suppress is affirmed.

Affirmed.

STEIGMANN, J., concurs.

TURNER, J., dissents.

Justice TURNER, dissenting:

Although I agree with the majority that Officer Davis had probable cause to initiate a valid traffic stop, I disagree with the majority's conclusion that Officer Davis' request for defendant to exit the car tainted the subsequent search. Therefore, I dissent.

This case is factually distinguishable from our supreme court's decision in *Brownlee*, relied upon by the majority. In that case, police officers stopped a vehicle and approached the car on both sides. *Brownlee*, 186 Ill. 2d at 506, 239 Ill. Dec. 25, 713 N.E.2d at 559. The officers obtained the identities of the occupants and checked for and found no outstanding warrants. *Brownlee*, 186 Ill. 2d at 506, 239 Ill. Dec. 25, 713 N.E.2d at 559. The officers decided not to issue any citations, but they did agree to ask the driver for permission to search the car. *Brownlee*, 186 Ill. 2d at 506, 239 Ill. Dec. 25, 713 N.E.2d at 559. One officer returned to the driver his license and insurance card and explained that no citations would be issued. *Brownlee*, 186 Ill. 2d at 506, 239 Ill. Dec. 25, 713 N.E.2d at 559. Thereafter, the officers stood near the car's doors for about two minutes and said nothing. *Brownlee*, 186 Ill. 2d at 520, 239 Ill. Dec. 25, 713 N.E.2d at 565-66. After the pause, the officer asked the driver to search the vehicle, and the subsequent search revealed controlled substances. *Brownlee*, 186 Ill. 2d at 506-07, 239 Ill. Dec. 25, 713 N.E.2d at 559-60.

This case is also factually distinguishable from this court's opinion in *Ortiz*. In that case, an officer with the Illinois State Police stopped the defendant driver for speeding and asked him for his driver's license and insurance information, which defendant provided. *Ortiz*, 317 Ill. App. 3d at 215, 250 Ill. Dec. 542, 738 N.E.2d at 1014. After asking general questions concerning the driver's destination and the ownership of the vehicle, the officer returned to his squad car and ran a criminal history check. *Ortiz*, 317 Ill. App. 3d at 215, 250 Ill. Dec. 542, 738 N.E.2d at 1014-15. The officer then decided to call in a canine unit, which arrived prior to the officer's receipt of the defendant's criminal history or the completion of his paperwork. *Ortiz*, 317 Ill. App. 3d at 215-16, 250 Ill. Dec. 542, 738 N.E.2d at 1015. The officer walked back to the truck and asked the defendant to exit the vehicle. *Ortiz*, 317 Ill. App. 3d at 216, 250 Ill. Dec. 542, 738 N.E.2d at 1015. Thereafter, the officer

issued the defendant a warning and returned his license, and, according to his testimony, the traffic stop was complete at that time. *Ortiz*, 317 Ill. App. 3d at 216, 250 Ill. Dec. 542, 738 N.E.2d at 1015. However, the officer then asked questions of the defendant, and after he refused to consent to a search of the truck, the canine unit eventually alerted to drugs in the vehicle. *Ortiz*, 317 Ill. App. 3d at 216-17, 250 Ill. Dec. 542, 738 N.E.2d at 1015-16.

In the case *sub judice*, however, Officer Davis did not ask defendant to step out of the car after he returned his license and insurance card. Nor did Officer Davis explain that citations would or would not be issued prior to asking defendant to exit the vehicle. Based on the videotape evidence, the investigative stop of defendant had not ended, as the stops had in *Brownlee* and *Ortiz*, and Officer Davis could have asked defendant to exit the vehicle. During a lawful traffic stop, a police officer may order the driver out of the vehicle (*Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S. Ct. 330, 333, 54 L.Ed.2d 331, 337 (1977)) as well as the passengers (*Maryland v. Wilson*, 519 U.S. 408, 415, 117 S. Ct. 882, 886, 137 L.Ed.2d 41, 48 (1997)). See *Sorenson*, 196 Ill. 2d at 433, 256 Ill. Dec. 836, 752 N.E.2d at 1084 ("following a lawful traffic stop, police may, as a matter of course, order the driver and any passengers out of the vehicle pending completion of the stop"). Thus, as no delay existed here, the majority's conclusion that the request for defendant to exit the car is the same as that in *Brownlee* is erroneous.

At the hearing, Officer Davis testified his reason for asking defendant to exit the car was "to speak with him about the complaint" involving his alleged cannabis activity. This, however, is not fatal to the State's case under our fourth amendment analysis. In *Ohio v. Robinette*, 519 U.S. 33, 35, 117 S. Ct. 417, 419, 136 L.Ed.2d 347, 352 (1996), Deputy Roger Newsome stopped the defendant, Robert Robinette, for speeding. Newsome received the defendant's license and ran a

computer check. *Robinette*, 519 U.S. at 35, 117 S. Ct. at 419, 136 L.Ed.2d at 352. Deputy Newsome then asked the defendant to exit his car, issued him a verbal warning, and returned his license. *Robinette*, 519 U.S. at 35, 117 S. Ct. at 419, 136 L.Ed.2d at 352. Thereafter, Newsome asked the defendant if he was carrying any contraband, and the defendant replied he was not. *Robinette*, 519 U.S. at 35-36, 117 S. Ct. at 419, 136 L.Ed.2d at 352. Deputy Newsome then received the defendant's consent to search his car, and the officer found controlled substances. *Robinette*, 519 U.S. at 36, 117 S. Ct. at 419, 136 L.Ed.2d at 352.

The Supreme Court found the fourth amendment does not require a police officer to advise a lawfully seized defendant that he is free to go before a consent to search will be deemed voluntary. *Robinette*, 519 U.S. at 39-40, 117 S. Ct. at 421, 136 L.Ed.2d at 355. The Supreme Court also noted the Supreme Court of Ohio, in ruling the search resulted from an unlawful detention, held that Deputy Newsome had returned to the defendant's car and asked him to exit, after he had determined not to give him a ticket. *Robinette*, 519 U.S. at 38, 117 S. Ct. at 420, 136 L.Ed.2d at 353-54. The Supreme Court, however, found "the subjective intentions of the officer did not make the continued detention of [the defendant] illegal under the [f]ourth [a]mendment." *Robinette*, 519 U.S. at 38, 117 S. Ct. at 420, 136 L.Ed.2d at 354. Moreover, the Supreme Court stated "there is no question that, in light of the admitted probable cause to stop Robinette for speeding, Deputy Newsome was objectively justified in asking Robinette to get out of the car, subjective thoughts notwithstanding." *Robinette*, 519 U.S. at 38, 117 S. Ct. at 421, 136 L.Ed.2d at 354.

Based on the foregoing, Officer Davis could ask defendant to exit his vehicle prior to the stop's completion notwithstanding his subjective intentions because defendant's vehicle had been lawfully detained for a traffic violation and defendant

could have been ordered out prior to the stop's conclusion. See *Robinette*, 519 U.S. at 38, 117 S. Ct. at 420, 136 L.Ed.2d at 354 (continued detention of the defendant based on officer's subjective intentions did not violate fourth amendment); *United States v. Mendenhall*, 446 U.S. 544, 554 n. 6, 100 S. Ct. 1870, 1877 n. 6, 64 L.Ed.2d 497, 509 n. 6 (1980) (the subjective intentions of a police officer are irrelevant to a fourth amendment analysis, except to the extent they have been communicated to the defendant). Thus, the effect of the majority's holding is to ignore the established precedent of the United States Supreme Court.

In *People v. Staley*, 334 Ill. App. 3d 358, 360, 268 Ill. Dec. 376, 778 N.E.2d 362, 363-64 (2002), a Pontiac police officer pulled a driver over for operating a vehicle with a suspended registration and later found the driver had no insurance. The police officer sat in his squad car to run a computer check and to write out two citations and then returned to the driver's vehicle to ask her to get in the squad car to issue the citations. *Staley*, 334 Ill. App. 3d at 361, 268 Ill. Dec. 376, 778 N.E.2d at 364. The officer then asked the driver for her consent to search the vehicle, which she gave. *Staley*, 334 Ill. App. 3d at 361, 268 Ill. Dec. 376, 778 N.E.2d at 364. The officer testified about 18 minutes elapsed from the stop of the car until he issued the citations and received the driver's consent to search. *Staley*, 334 Ill. App. 3d at 361, 268 Ill. Dec. 376, 778 N.E.2d at 364.

This court held the 18-minute traffic stop was reasonable, not unduly long, and affirmed the defendant passenger's conviction for possession of a controlled substance. *Staley*, 334 Ill. App. 3d at 366-67, 369, 268 Ill. Dec. 376, 778 N.E.2d at 368-69, 370. Thus, an officer's request that a driver step out of the vehicle to issue a citation does not impermissibly extend the traffic stop. The majority here would conclude the officer in *Staley* could not have asked the defendant to get in his squad car to issue the citations because "the traffic stop was neverthe-

less complete" (op. 281 Ill. Dec. at 211, 803 N.E.2d at 615.) even though the temperature in that case was -9 degrees. *Staley*, 334 Ill. App. 3d at 360, 268 Ill. Dec. 376, 778 N.E.2d at 363.

The United States Supreme Court has stated

> "The hazard of accidental injury from passing traffic to an officer standing on the driver's side of the vehicle may also be appreciable in some situations. Rather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both." *Mimms*, 434 U.S. at 111, 98 S. Ct. at 333, 54 L.Ed.2d at 337.

Although our facts here do not indicate any particular hazardous conditions, the majority's holding makes no exception for such situations. The majority now forces police officers to brave inclement weather and roadside conditions when returning a driver's license or issuing citations, unable to ask a driver out of the car prior to the stop's completion.

Here, Officer Davis asked defendant to step out of the car roughly six minutes after stopping the vehicle. After Officer Davis asked defendant to "hop on out" of the car, but before he could complete the traffic stop, subsequent events in quick succession led to the discovery of incriminating evidence on defendant's person. The trial court's conclusion that the traffic stop was completed was therefore against the manifest weight of the evidence. Further, I would find Officer Davis had probable cause to arrest defendant when defendant volunteered he possessed cannabis and a smoking pipe resulting in the subsequent discovery of those items on his person. I would therefore reverse the trial court's judgment.

IN THE CIRCUIT COURT FOR THE ELEVENTH JUDICIAL CIRCUIT, LIVINGSTON COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	No. 02 CF 163
Plaintiff,	)	
	)	Honorable
WILLIAM A. MILLER,	)	Harold J. Frobish,
	)	Judge Presiding.
Defendant.	)	

Excerpt from Transcript of Proceedings, November 8, 2002

* * *

THE COURT: Stop that a second.

That appears to have the officer saying, quote, would you step on out, would you step on out for a second. Is that what everybody else heard?

Q I believe, that's what I heard, your Honor.

THE COURT: Okay.

Not wanting to cut anybody short, but the Appellate Court when they get this will say, at that instant he was seized, it's an absolute seizure of the defendant. The Appellate Court will say, this was a good stop, if you have excessive or unusual noise out of your muffler, the police can stop. The Appellate Court will say the traffic stop was a 100 percent completed. And the Appellate Court will say, Frobish, why in the world didn't you suppress this search because this defendant was told

to get out of the car. He was, in the magical words of the Appellate Court, and I don't always agree with them, very often I don't, they'll say he was seized, and he was seized without any probable cause, based on this evidence, to believe he had any drugs. This is a dead-bang winner for the defense unless someone can tell me that I'm wrong on that. I'm glad to look at law.

This traffic, I mean, very few of these are so clear. But, I mean, we've got a good stop, we've got the traffic stop completed, we've got the defendant in the car. The other officers didn't add a lot other than in his mind, of the defendant or anybody else, this looks like it's pretty serious. But this amounts to an instruction by the officer to get out of the car. He is seized at that point, and it's at that point that the stop is tainted.

I don't think there's one chance in a thousand that the Appellate Court would uphold a denial of a motion to suppress. I'm willing, Mr. Brown, to hear your argument.

* * *

THE COURT: All right. It troubles me, Mr. Miller, this is a class 4 felony, you should probably be going to prison for three years because you're dirty as sin, but I believe your constitutional rights were violated as presently interpreted by the Appellate Court.

Now, I hope the State appeals this decision because I am granting the motion to suppress. You're lucky you live in the United States. You probably deserve to be in prison for three years, and next time that's what may happen to you. You're guilty as sin. It bothers me to cut you loose. We're cutting you loose for the greater good because in this country people have rights. You're not deserving of them, in a sense. Try to be a better citizen if you can.

All right. The motion to suppress is granted, and I hope the State appeals.

* * *

THE COURT: Again, for purposes of the record, I think what happened here is what amounts to, as I understand it, it is most correctly characterized as a direction to get out of the car. It was put in the form of a question, but you add all this together, this defendant figured he had to get out of the car.

All right. That will conclude the Miller matter.

* * *

No. 04-259

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

ILLINOIS, PETITIONER,

v.

WILLIAM A. MILLER, RESPONDENT.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent's brief in opposition rests upon two patently incorrect propositions. With respect to the first question presented, respondent contends that *Ohio v. Robinette*, 519 U.S. 33 (1996), and *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), are distinguishable because, unlike the officers in those cases, the officer here had no "objective justification" for ordering respondent out of his car. Opp. 6. But *Robinette* and *Mimms* make clear that the *only* objective justification necessary for ordering a driver out of his car is "probable cause to stop" the driver for a traffic offense. *Robinette*, 519 U.S. at 38-39 (citing *Mimms*, 434 U.S. at 111 n.6). That justification was undeniably present here. Accordingly, the decision below is directly contrary to *Robinette* and *Mimms* — indeed, the Illinois Appellate Court did not even bother to acknowledge, let alone distinguish, either of those precedents.

With respect to the second question presented, respondent denies that the Illinois Appellate Court applied *Terry* principles to evaluate the Fourth Amendment validity of the officer's order that respondent exit his car. Opp. 7, 10. Respondent's denial is preposterous. See Pet. App. 8a-11a (applying two-pronged *Terry* analysis to officer's conduct). Thus, the Illinois court's application of *Terry* directly implicates the deep and intractable conflict over whether *Terry* principles govern police conduct during a probable cause-based traffic stop.

A. As shown in the petition, the Illinois Appellate Court effectively held that the rule set forth in *Mimms* and applied in *Robinette* — that an officer may order the driver out of his car during a traffic stop — does not apply near the conclusion of the stop. Pet. 4-5, 7. Respondent does not adopt this view of the *Mimms* rule, and does not deny that such a view conflicts

with the decisions of other lower courts. See Pet. 8-9. Instead, respondent argues that the decision below is consistent with this Court's understanding of the *Mimms* rule. Opp. 5-6.

Respondent is incorrect, for the Illinois Appellate Court's decision reaches the opposite result as *Robinette* on materially identical facts. In both this case and *Robinette*, the officer stopped the driver for traffic violations and decided to issue a warning rather than a ticket. See *Robinette*, 519 U.S. at 35; Pet. App. 3a-4a. In both cases, before issuing the warning, the officer asked the driver to exit the car. See *Robinette*, 519 U.S. at 35; Pet. App. 6a. In both cases, the driver argued that the officer ordered him to exit the car, not for any reason related to safety or the traffic violation, but to determine whether he was committing an unrelated crime. See *Robinette*, 519 U.S. at 37-38; Pet. App. 4a, 10a-11a. And in both cases, the state court held that the officer's order violated the Fourth Amendment because there were no "articulable facts" to suggest that the driver was indeed committing an unrelated crime. *State v. Robinette*, 73 Ohio St. 3d 650, 650, 653 N.E.2d 695, 696 (1995); Pet. App. 10a-11a.

This Court reversed in *Robinette*. Citing *Whren v. United States*, 517 U.S. 806 (1996), the Court noted that "the subjective intentions of the officer did not make the continued detention of [the driver] illegal under the Fourth Amendment." *Robinette*, 519 U.S. at 38. The Court added:

> As we made clear in *Whren*, the fact that [an] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.

Ibid. (internal quotations omitted). Given these principles, and in light of the *Mimms* rule, the Court concluded that "there is no

question that, in light of the admitted probable cause to stop [the driver] for speeding, [the officer] was objectively justified in asking [the driver] to get out of the car, subjective thoughts notwithstanding." *Ibid.* (citing *Mimms*, 434 U.S. at 111 n.6).

Like the defendant in *Robinette*, respondent argues here that the officer ordered him out of his car to question him about unrelated crimes, not for reasons related to safety or his traffic offense. Opp. 5-6. But *Robinette* holds in no uncertain terms that an officer need not have safety concerns in mind to justify ordering the driver out of his car. As long as an officer has "probable cause to stop" the driver for observed traffic violations — and such probable cause was indisputably present here, see Pet. App. 8a-9a — the officer has the objective justification necessary to order the driver to exit his car, "subjective thoughts notwithstanding." *Robinette*, 519 U.S. at 38. This is so even where the officer's subjective motivation is to investigate a crime unrelated the traffic offense itself. *Ibid.* To hold otherwise would violate the categorical rule that "a police officer may *as a matter of course* order the driver of a lawfully stopped car to exit his vehicle." *Maryland v. Wilson*, 519 U.S. 408, 410 (1997) (citing *Mimms*) (emphasis added).[1]

The decision below is fundamentally incompatible with *Robinette* and *Mimms*. Even though the dissent below cogently explained why *Robinette* and *Mimms* governed this case and required affirmance of respondent's convictions, see Pet. App. 13a-15a (Turner, J., dissenting), the majority failed to even acknowledge those precedents. Given the Illinois court's patent

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[1] Respondent repeatedly suggests that the officer ordered respondent out of his car "after" the traffic stop. Opp. 3, 4, 5, 6. That is incorrect, as the officer still had not issued a warning at the time he ordered respondent to exit his car. Pet. App. 6a (describing videotape of the encounter). That is precisely what transpired in *Robinette*. See 519 U.S. at 35.

disregard for *Mimms* and *Robinette*, certiorari should be granted, and summary reversal might be appropriate. See, *e.g.*, *Smith v. Texas*, 543 U.S. ___ (2004) (per curiam) (summary reversal where decision below plainly inconsistent with *Penry v. Johnson*, 532 U.S. 782 (2004)); *Illinois v. Fisher*, 540 U.S. 544 (2004) (per curiam) (same where decision below foreclosed by *Arizona v. Youngblood*, 488 U.S. 51 (1988)).

B. As shown in the petition, the decision below deepens an existing conflict over whether *Terry* principles govern police conduct during a traffic stop justified by probable cause. Pet. 9-16. Respondent does not deny that this conflict exists (Pet. 10-14), that the conflict leads different courts to reach inconsistent results under materially identical circumstances (Pet. 15), or that the standard governing police action during probable cause-based stops is an issue that recurs with great frequency (Pet. 16). Rather, respondent argues that this case does not implicate the conflict because, he says, the Illinois Appellate Court "did not hold that *Terry* principles govern the Fourth Amendment validity of police conduct at traffic stops." Opp. 10.

Respondent is flatly wrong. The Illinois Appellate Court plainly applied *Terry* principles in holding that the officer violated the Fourth Amendment by ordering respondent to exit his car. Pet. App. 8a ("Because a traffic stop is more analogous to a *Terry* investigative stop * * * than to a formal arrest, the reasonableness of a traffic stop is analyzed under *Terry* principles.") (internal quotations and citation omitted); *id.* 8a (the officer did not violate "the first prong of *Terry*"); *id.* 9a, 11a (the officer violated "the second prong of the *Terry* analysis" because "[h]is request for defendant to exit the car was [made] without articulable facts justifying a *Terry* investigative seizure"). Accord, *People v. Gonzalez*, 204 Ill. 2d 220, 228, 789 N.E.2d 260, 266 (2003) (declining to "distinguish between those cases in which the traffic stop is based on

Terry's 'articulable suspicion' and those cases in which the traffic stop is supported by probable cause," and holding that "*Terry* principles apply even in the presence of probable cause"). Thus, this case directly implicates the conflict among the lower courts over whether *Terry* principles govern the Fourth Amendment validity of police conduct at traffic stops justified by probable cause.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal on the first question presented, or to hold the petition pending resolution on the merits of *Illinois v. Caballes*, No. 03-923, or *Muehler v. Mena*, No. 03-1423, which may address issues closely related to the second question presented.

Respectfully submitted.

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